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## Medical Marijuana Zoned Out: Local Regulation Meets State Acceptance and Federal Quiet Acquiescence

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# MEDICAL MARIJUANA ZONED OUT: LOCAL REGULATION MEETS STATE ACCEPTANCE AND FEDERAL QUIET ACQUIESCENCE

*Patricia E. Salkin and Zachary Kansler\**

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## I. INTRODUCTION

Despite the fact that the federal government does not explicitly allow it,<sup>1</sup> sixteen states and the District of Columbia currently permit the medical use of marijuana for qualified patients (Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington).<sup>2</sup> Despite authorizing the use of medical marijuana to covered citizens, most of the state statutes fail to account for the challenges that confront municipalities whose residents demand that attention be paid to the public health and safety issues attendant to the cultivation, sale, distribution, and use of this medication. The intensity of the problem is

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1. Deputy U.S. Attorney General David W. Ogden's memorandum regarding the medical use of marijuana provides that those who follow state law to use, acquire, and supply medical marijuana, will not be prosecuted by the federal government. See Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice to Selected U.S. Att'ys, (Oct. 19, 2009) (on file with author). Where federal law enforcement understand that a state medical marijuana law is violated, federal law enforcement will bring criminal charges, as verified by a statement of Andre Birotte Jr., the United States attorney in Los Angeles, and recent prosecutions in California. Jennifer Medina, *U.S. Attorneys in California Set Crackdown in Marijuana*, N.Y. TIMES, Oct. 7, 2011, [http://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html?\\_r=1&scp=2&sq=Medical%20Marijuana&st=cse](http://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html?_r=1&scp=2&sq=Medical%20Marijuana&st=cse). Additionally, courts will not allow the DOJ position to stand as an affirmative defense to criminal charges of growing and selling marijuana for non-medicinal purposes in the states that authorize such use. See, e.g., *Judge: State Pot Law No Defense in Federal Case*, AZ FAMILY NEWS, Sept. 22, 2010, available at <http://www.azfamily.com/news/national/103578209.html>; see also *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 110 (Cal. App. Ct. 2010) (holding that a city ordinance imposing penalties for the operation of a medical marijuana dispensary is not preempted by federal law).

2. COLO. CONST. art. XVIII § 14; ALASKA STAT. §§ 17.37.010-.080 (2010); Arizona Medical Marijuana Act, ARIZ. REV. STAT. ANN. § 369-2811 (2011); Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); Delaware Medical Marijuana Act, DEL. CODE ANN. tit. 16, § 4903A (2011); HAW. REV. STAT. ANN. §§ 329-121 to -128 (Supp. 2007); Maine Medical Use of Marijuana Act, ME. REV. STAT. tit. 22, §§ 2421 to 2430-A (Supp. 2010); Michigan Medical Marijuana Act, MICH. COMP. LAWS ANN. §§ 333.26421-26430 (West Supp. 2011); Medical Marijuana Act, MONT. CODE ANN. §§ 50-46-101 to -210 (2009); NEV. REV. STAT. ANN. §§ 453A.010-.810 (2009); New Jersey Compassionate Use Medicinal Marijuana Act, N.J. STAT. ANN. §§ 24:61-1 to -16 (West Supp. 2010); Lynn and Erin Compassionate Use Act, N.M. STAT. ANN. §§ 26-2B-1 to -7 (2007); OR. REV. STAT. ANN. §§ 475.300-.346 (West Supp. 2011); The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS §§ 21-28.6-1 to -12 (Supp. 2010); VT. STAT. ANN. tit. 18, §§ 4472-4474d (Supp. 2010); WASH. REV. CODE ANN. §§ 69.51A.005-.090 (West Supp. 2011); D.C. CODE § 7-1671.02(a) (2011).

perhaps most evident in Los Angeles—where there are approximately 800 dispensaries,<sup>3</sup> including vending machines dispensing the drug in various nooks and crannies throughout the City.<sup>4</sup> The popularity of marijuana for medicinal purposes is also evident in Michigan where more than 56,000 applications from would-be patients were submitted for inclusion on the state registry in a nineteen month period, creating an administrative backlog.<sup>5</sup> Employees of medical marijuana businesses are even becoming unionized.<sup>6</sup> In this challenging economic climate, it is likely that the obstacles posed to host municipalities where cultivation, dispensing, and use occurs will only become exacerbated in a short period of time—as evidenced by the steep licensing and approval fees collecting by governments starving for non-taxpayer revenues.<sup>7</sup>

Varying statutory approaches are provided for individuals to legitimately acquire the medical marijuana—they may grow it themselves,<sup>8</sup> they may obtain it from their primary caregiver,<sup>9</sup> or they may obtain it from a licensed dispensary.<sup>10</sup> This raises a number of land use regulatory questions including: whether state law preempts local zoning when it comes to growing, buying, and using marijuana for medicinal purposes; whether distance requirements—similar to those used in the regulation of adult business uses—can be utilized to regulate the use of medical marijuana; and what types of special use permit considerations may be appropriate for considering activities related to the use of medical marijuana. In addition, questions as to whether growing and sale of the medical marijuana may constitute a valid home occupation and whether marijuana is or should be considered an agricultural crop—and, if so, what impact this would have on the rela-

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3. Thomas Suh Lauder et. al, *Interactive Map: Where's the Weed?*, L.A. TIMES, <http://www.latimes.com/news/local/la-me-dispensaries-i,0,5658093.htmlstory> (last visited Oct. 2, 2011).

4. *Pot Vending Machines Take Root in Los Angeles*, MSNBC.COM, Jan. 20, 2008, <http://www.msnbc.msn.com/id/22910820/>.

5. Cecil Angel, *Legal Pot Applications Swamp State*, DETROIT FREE PRESS, Sept. 22, 2010, available at <http://cannabisnews.com/news/25/thread25958.shtml>.

6. Marcus Wohlsen, *Medical Marijuana Growers Join Teamsters Union*, BLOOMBERG BUSINESSWEEK, Aug. 20, 2010, <http://www.businessweek.com/ap/financialnews/D9IBM2CO0.htm>.

7. For example, under the regulations proposed by the District of Columbia, an application to operate a dispensary or cultivation operation would cost \$5000, and annual licensing fees for cultivation will cost \$5000 and \$10,000 for dispensaries. See D.C. Proposed Rulemaking, §§ 5102–5203, *supra* note 4. In addition registrations fees will be collected by the government for managers, employees, and officers of these businesses. *Id.*

8. See, e.g., N.M. CODE R. § 7.34.4.8(A)(1) (LexisNexis 2010) (allowing a qualified patient to grow marijuana only for their personal use).

9. See, e.g., N.M. STAT. ANN. § 26-2B-3(F) (2007) (defining primary caregiver).

10. COLO. REV. STAT. § 12-43.3.104(8) (2011) (defining medical marijuana center as licensed dispensary).

tionship between agricultural regulation/policy and zoning—suggest a growing number of unanswered land use law questions in this emerging area.

This article examines how municipalities are beginning to address the challenging land use issues that confront communities faced with the cultivation, distribution, and use of the drug. There is no strategy or policy recommended; rather, this article demonstrates the efforts taken by municipalities to impose meaningful regulations on the distribution of medical marijuana while also attempting to satisfy the particular characteristics of their community.

## II. LAND USE REGULATION AND MEDICAL MARIJUANA

Municipal planners and attorneys are testing a variety of theories and tools in efforts to craft meaningful regulatory regimes to manage the growing presence of businesses and users emanating from the novelty of the legalization of marijuana for medicinal purposes, while also staying true to their communities' proclivities. From common law theories of nuisance to the regulatory techniques in the zoning toolkit, approaches are varied and largely untested in terms of effectiveness.

### *A. Preemption: A Viable Option for the Resistant Community?*

Preemption issues abound when it comes to the legalized use of marijuana. Some communities focus on whether federal law trumps state law, and if so, whether that means that the municipalities need not follow state law, or whether state law preempts the local law, requiring municipal adherence. Setting the stage for the preemption dispute is the federal government, whose law explicitly states that marijuana is a schedule one drug<sup>11</sup> and is thus illegal to possess or distribute.<sup>12</sup> An issue immediately arises when state law decriminalizes medical marijuana, allowing for distribution, possession, and consumption, and a local government wishes to follow the federal criminal law rather than the state law, due in part perhaps to the community's aversion to the use, sale, or cultivation of marijuana.

Anaheim, California, set the stage for this issue.<sup>13</sup> The City enacted Ordinance 6067, entitled "Medical Marijuana Dispensary Prohibited," which made it unlawful to operate or be employed by a medical marijuana dispensary, with a

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11. See 21 U.S.C. § 812(c)(Schedule I)(c)(17) (2006) (marijuana's psychoactive chemical compound is tetrahydrocannabinols).

12. 21 U.S.C. § 841(a).

13. See generally *Qualified Patients Ass'n v. Anaheim*, 115 Cal. Rptr. 3d 89 (App. Ct. 2010) (ruling on an Anaheim Ordinance prohibiting Medical Marijuana dispensaries).

violation of the ordinance punishable as a misdemeanor.<sup>14</sup> After the passage of the ordinance, the plaintiff sought to open a medical marijuana dispensary, and soon thereafter sought a declaratory judgment that the California Compassionate Use Act and the Medical Marijuana Program Act preempted the local law.<sup>15</sup> The trial court found that federal law preempted the California Acts, and appeal ensued.<sup>16</sup> While the appellate court could not make any determination regarding the claim that state law preempted the local law, as that issue was not yet addressed by the trial court and thus not ripe,<sup>17</sup> the court concluded that the state law was not preempted by federal law, as the state law did not conflict with (require conduct that is at odds with federal law) or create an obstacle for the federal law.<sup>18</sup>

In dicta, reviewing the complaint and the allegations therein most favorably to the plaintiff, with respect to the state preemption of the local ordinance, the court concluded that “it appears incongruous at first glance to conclude a city may criminalize as a misdemeanor a particular use of property the state expressly has exempted from ‘criminal liability.’”<sup>19</sup> Although the issue has yet to be specifically addressed, it appears as though state decriminalization laws will effectively preempt local laws that attempt to criminalize the same conduct.

Also, under a similar, perhaps sympathetic analysis as found in *Qualified Patients Association*, it appears that federal law will not be held to preempt state law decriminalizing medical marijuana. This is based on the theory that the state laws do not directly conflict with federal law, as they do not require any actor to commit a violation,<sup>20</sup> and do not obstruct federal law, as they serve the same purpose, to limit recreational drug use.<sup>21</sup>

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14. Anaheim, Cal., Ordinance No. 6067 (Aug. 7, 2007) (codified as ANAHEIM, CAL., MUNICIPAL CODE § 4.20.030).

15. *Qualified Patients Ass’n*, 115 Cal. Rptr. 3d at 92.

16. *Id.*

17. *Id.* at 102.

18. *Id.* at 107, 110. There are four types of preemption, conflict, obstacle, field, and express. *Id.* at 106. The court did not address field and express preemption as they did not apply. *Id.*

19. *Id.* at 103.

20. *Id.* at 106–07.

21. *Id.* at 108. The court also noted that obstacle preemption was not evident, as the federal government cannot use state and local law enforcement for the enforcement of federal statutes. As such, state and local law enforcement cannot, under this model, be deemed to obstruct federal enforcement of federal law. The court stated, “Just as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana.” *Id.* at 109. The outcome of this case may be cast in doubt. Recent opinions, from another appellate court in California and the Oregon Supreme Court, have found that enactments that expressly authorize medical marijuana use, rather than mere decriminalization, constitute obstacle preemption. *Pack v. Superior Court*,



Furthermore, federal preemption may become less of an issue for state laws permitting medical marijuana use and distribution due to the attitude and conduct of the federal government. While the U.S. Supreme Court held in 2005 that the federal government could ban the cultivation of marijuana for medicinal purposes in states that allowed such conduct,<sup>22</sup> Deputy U.S. Attorney General, David W. Ogden, released a memorandum in 2009 stating that the federal government would not prosecute those who abide by their respective state's medical marijuana law.<sup>23</sup> Additionally, the Department of Veterans Affairs will allow patients under their care to utilize medical marijuana; however, the Department will not proscribe such medication, as it must be procured through a private physician.<sup>24</sup> There is no claim that Ogden's memorandum and the new Veterans Affairs policy is even remotely legally sufficient to bar preemption. Rather, such an illustration is made to show the current Administration's receptivity to medical marijuana,<sup>25</sup> or at least its views on federalism and state rights. Proponents of the legalization of the drug must take note, however, of Congress' failed 2007 attempt to enact a bill that would have prohibited the Department of Justice from pursuing criminal action against those who use legally use marijuana for medicinal purposes in those states allowing such use.<sup>26</sup>

### B. Nuisance Law

Municipal attorneys are beginning to test legal theories in an effort to slow or prevent the cultivation and sale of the drug in their jurisdictions. For example, the San Jose, California Deputy City Attorney has opined that the City

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No. B228781, 2011 WL 4553155 at \*11 (Cal. Ct. App. Oct. 4, 2011); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 536 (Or. 2010).

22. *Gonzales v Raich*, 545 U.S. 1, 22 (2005) (the Court reasoned that banning the cultivation of marijuana for medicinal purposes would serve the goal of preventing the drug from entering the commerce stream for non-medicinal purposes).

23. Memorandum from David W. Ogden, *supra* note 1.

24. Dan Frosch, *V.A. Easing Rules for Users of Medical Marijuana*, NY TIMES, July 23, 2010, <http://www.nytimes.com/2010/07/24/health/policy/24veterans.html>.

25. It is acknowledged, however, that a medical marijuana cultivator in Colorado is facing federal drug charges. See John Ingold, *Man Charged With Growing Pot Loses Early Court Tussles to Feds*, DENVERPOST.COM, Sept. 23, 2010, [http://www.denverpost.com/news/marijuana/ci\\_16148516#ixzz111QLTGCV](http://www.denverpost.com/news/marijuana/ci_16148516#ixzz111QLTGCV). Such charges seem to stem from state law violations, however, which would put him out side of the protections mentioned in Ogden's memorandum. *Id.* "Bartkowicz [the cultivator] has maintained that his operation was compliant with state law, something federal officials have disputed." *Id.*

26. See 153 CONG. REC. 20627 (2007). The bill failed by a vote of 165–262. Office of the Clerk, *Final Results for Roll Call 722*, HOUSE.GOV (Jul. 25, 2007, 10:52 PM), <http://clerk.house.gov/evs/2007/roll733.xml>.

Code does not allow for a land use that is a nuisance, and that conduct which is illegal under state or federal law, constitutes a nuisance.<sup>27</sup> Since the cultivation, sale, and use of marijuana is illegal under federal law, he asserts that medical marijuana dispensing facilities would constitute a nuisance.<sup>28</sup> Therefore, since San Jose's existing municipal code effectively bans medical marijuana dispensaries, he has advised that the adoption of a moratorium is unnecessary.<sup>29</sup> Also, one California court recently held that failure to comply with the City's procedural requirements related to medical marijuana dispensaries created a nuisance per se and the imposition of a preliminary injunction was within the courts discretion.<sup>30</sup>

### C. Zoning

The power to zone is most commonly vested within the state, and is then afforded to the various municipalities within the state.<sup>31</sup> Through either home rule law, or pursuant to the enabling state legislation, municipalities may enact zoning ordinances.<sup>32</sup> Zoning ordinances are "presumed to be constitutional[,] should be construed liberally in favor of the municipality," and—because the ordinance is legislative—courts should defer to the municipality's judgment.<sup>33</sup> Also, zoning ordinances are usually based upon the police power of the state, which has been expanded to encompass the various goals of a municipality, including aesthetics.<sup>34</sup> The following discussion will outline the various zoning ordinances utilized by municipalities, focusing on their quest to restrict and regulate the distribution of medical marijuana, allowing such a land use to conform to the expectations and disposition of the community.

#### 1. Moratoria

Whenever new and seemingly controversial land uses arrive on the scene, it is not uncommon for planners and municipal officials to enact moratoria to buy time to study the phenomena and develop appropriate and adequate regulations to adapt the community to these unfamiliar uses. The advent of medical

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27. Memorandum from Richard Doyle, City Att'y, City of San Jose, to Mayor and City Councilmembers (Mar. 16, 2010).

28. *Id.*

29. *Id.*

30. *City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1, 12 (Cal. App. Ct. 2008).

31. 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 2:2 (5th ed. 2010) (citations omitted).

32. *Id.* at § 2:4 (citations omitted).

33. *Id.* at § 2:24.

34. *Id.*



marijuana is no exception as a number of municipalities use this preparatory tool.<sup>35</sup> Some local governments have enacted temporary bans on the use of land as a medical marijuana dispensing facility with the purpose of developing appropriate regulations.<sup>36</sup> Fresno, California, for example, has effectuated a moratorium while at the same time statutorily defining and setting out guidelines for the permitting of medical marijuana dispensing facilities.<sup>37</sup> At least one court has upheld the use of moratoria in this regard.<sup>38</sup> Some municipalities, however—such as Orange County, California—have refused to enact moratoria on the granting of special use permits for medical marijuana collectives or cooperatives in unincorporated areas of the county.<sup>39</sup>

## 2. Prohibitions

For various reasons, some localities may determine that medical marijuana dispensing facilities do not fit within their particular community. In such an instance, some municipalities may enact an ordinance that prohibits the operation of a medical marijuana dispensary in all zoning districts within said municipality.<sup>40</sup> This tactic of eliminating the presence of dispensing facilities should be effective, and not preempted by state law, so long as it does not criminalize the land use.<sup>41</sup>

## 3. Zoning Definitions

Perhaps the most important part of a zoning regulation is the definition section. Municipalities are inserting various terms related to the regulation of medicinal marijuana into local zoning codes. For example, a “medical marijuana

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35. See, e.g., New Castle, Colo., Ordinance 2009-13 (Nov. 17, 2009).

36. TEHAMA COUNTY, CAL., MUNICIPAL CODE § 17.08.070 (2009); Aurora, Colo., Ordinance 2009-57 (Nov. 16, 2009); Louisville, Colo., Ordinance 1561 (Oct. 13, 2009); Manitou Springs, Colo., Ordinance 2109 (Dec. 15, 2009); New Castle, Colo., Ordinance 2009-13 (Nov. 17, 2009).

37. FRESNO, CAL., MUNICIPAL CODE § 12-306(N)(56)(c) (2011). Note, however, all dispensaries are currently enjoined from operating in Fresno, pending litigation, on the theory that federal law does not allow for the sale of medical marijuana. See 21 U.S.C. § 812(c)(Schedule I)(c)(10) (2006); see also *City of Fresno v. Marejg Prop.*, No. 09 CECG 02906, slip op. at 4 (Super. Ct., Cnty. Fresno 2009).

38. See *City of Claremont v. Kruse*, 100 Cal. Rptr. 1, 22 (Cal. App. Ct. 2009).

39. Raja Abdulrahim, *Orange County Pot Dispensaries Exist in a Gray Zone*, L.A. TIMES, Sept. 22, 2010, <http://www.latimes.com/news/local/la-me-oc-marijuana-20100922,0,1288824.story>.

40. See, e.g., SIERRA MADRE, CAL., MUNICIPAL CODE § 17.10.010 (2010).

41. See discussion *supra* Part II B.

dispensary” has been defined as a location or facility that is used to make available or distribute medical marijuana to primary caregivers, qualified patients, or people with an identification card.<sup>42</sup> A “medical marijuana collective or cooperative” is commonly defined an association of people whose intent is to educate about medical marijuana and to assist in the lawful distribution of medical marijuana.<sup>43</sup> When regulating dispensaries, collectives, and cooperatives, some municipalities allow all forms, and others are restrictive. In San Francisco, for example, only cooperatives or collectives are allowed, but the city’s Health Code refers to them as dispensaries.<sup>44</sup> Throughout this article, when discussing these types of facilities in relation to land use, they will be called marijuana dispensing facilities, unless otherwise noted. Though the definition of what establishment is permitted in the municipality is of supreme importance to the dispensary owner or the qualified patient, in the context of land use it is less relevant. Thus, a general term is sufficient for our purposes.

#### 4. *Distance Restrictions*

##### a. *State Statutes/Regulations on Medical Marijuana and Zoning*

With the enactment of recent legislation, now almost half of the states permitting the use of medical marijuana have recognized the land use dilemma, and have offered limited assistance to municipalities. New Mexico is one such state that has afforded land use guidelines. New Mexico provides, among other restrictions, that personal grow sites and non-profit dispensing facilities may not be located within three-hundred feet of any school, church, or day care center.<sup>45</sup> In addition, this dispensary must prove the location is secure, and illustrate what security devices are to be utilized.<sup>46</sup> Maine and Rhode Island similarly require dispensaries not be located within five-hundred feet of the property line of any existing public or private school, that there be a security plan, and the cultivation of medical marijuana must take place in an enclosed, locked facility.<sup>47</sup> A new law in Colorado, which added more structure and regulation than afforded prior there-to, provides that state or local licenses may not be issued to dispensing fa-

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42. DENVER, COLO., CODE OF ORDINANCES § 24-402(3) (2011); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.020 (2009); TEHAMA COUNTY, CAL., MUNICIPAL CODE § 17-08-070(B) (2010).

43. See, e.g., ARCATA, CAL., MUNICIPAL CODE § 9.100.020 (2010).

44. S.F., CAL., HEALTH CODE § 3301(f) (2010).

45. N.M. ADMIN. CODE § 7.34.4.8(D) (2011).

46. *Id.* § 7.34.4.8(C)(5).

47. ME. REV. STAT. ANN. tit. 22, § 2428(6)(b) (Supp. 2010); R.I. GEN. LAWS §§ 21-28.6-12(f)(2), (5) (Supp. 2010).

cilities if the facilities are within one-thousand feet of the location where a permit for a similar license was denied due to the nature of that use or the effect that use had on the surrounding area.<sup>48</sup> Also, a license for the sale of medical marijuana may not be issued if the location is within one-thousand feet of any school, alcohol or drug abuse treatment facility, principal campus of a seminary, college or university, or a child care facility.<sup>49</sup>

Of the States just recently decriminalizing medical marijuana, Arizona and Delaware do not permit dispensing or cultivation facilities to be located within five hundred feet of any school.<sup>50</sup> Additionally, in 2010, California amended their statute addressing medical marijuana, now prohibiting dispensing facilities within six hundred feet of private or public K-12 schools.<sup>51</sup>

With the recent enactments, seven<sup>52</sup> of the sixteen<sup>53</sup> states permitting the use of medical marijuana address the impact that the distribution of medical marijuana have on the community. The restrictions implemented by these states, however, are quite limited in scope, thus many municipalities have been forced to implement their own plans. The following discussion concerns these local efforts.

#### b. *Local Land Use Regulations*

Many municipalities that address medical marijuana dispensing facilities in their ordinances or regulations include provisions that seek to distance these facilities from residential uses of land.<sup>54</sup> Some municipalities require a thousand foot distance between the property lines of a medical marijuana dispensing facility and any residential zone districts.<sup>55</sup> Other municipalities require a distance of

48. COLO. REV. STAT. § 12-43.3-308(1)(a) (2011).

49. *Id.* § 12-43.3-308(1)(d)(I).

50. ARIZ. REV. STAT. ANN. § 36-2804(B)(1)(b)(ii) (2011); DEL. CODE ANN. tit. 16, § 4919A(d) (2011).

51. CAL. HEALTH & SAFETY CODE § 11362.768(b) (2011). This law does not preempt local ordinances addressing this spacing requirement if such ordinances were enacted prior to January 2011. *Id.* at § 113.768(g).

52. ARIZ. REV. STAT. ANN. § 36-2804(B)(1)(b)(ii); CAL. HEALTH & SAFETY CODE § 11362.768(b); COLO. REV. STAT. § 12-43.4-308(1)(a); DEL. CODE ANN. tit. 16, § 4919A(d); ME. REV. STAT. ANN. tit. 22, § 2428(6)(b); N.M. ADMIN. CODE § 7.34.4.8(D); R.I. GEN. LAWS §§ 21-28.6-12(f)(2), (5).

53. *See supra* note 2.

54. *See, e.g.*, FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040(B)(12)(b) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26.88.126(h)(1) (2009).

55. COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(1)(b)-(d) (2009) MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(1)(a)-(c) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009).

five-hundred feet.<sup>56</sup> Some municipalities allow less of a distance between the property lines of a dispensing facility and residential district, such as Arcata, California, where a dispensing facility may operate three-hundred feet from a residential zone district—<sup>57</sup>and Santa Cruz, California—where a dispensing facility may be within fifty feet of a residential unit if it can be proven that it will not have an adverse affect on the residential unit.<sup>58</sup> Los Angeles, California, is somewhat more lenient—allowing dispensing facilities to come into close contact with residential uses by only requiring that the dispensing facility not abut, be across the street or alley from, or share a corner with a lot zoned for residential use or improved with a residential use.<sup>59</sup> San Mateo County, California’s regulation contains no distance requirement, but allows for the subjective assessment that there must be a sufficient distance between the dispensing facility and residential zone districts—so as not to adversely affect the residential use.<sup>60</sup>

In addition to distance from residential uses, local governments may wish to keep medical marijuana dispensing facilities a sufficient distance from locations that are frequented by children—including schools, parks, playgrounds, daycares, and youth facilities.<sup>61</sup> Los Angeles County, California, is one municipality that imposes such a distance restriction, limiting dispensing facilities to locations that are one-thousand feet from the nearest school.<sup>62</sup> Some municipalities go further than simple distance restrictions. In Alameda County, California, if a dispensary is within one-thousand feet of any school, it must cease operations for an hour and a half after school lets out.<sup>63</sup> One municipality has also decided that the age of the children warrants increased distance requirements between

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56. FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040(B)(12)(b) (2009).

57. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(E)(1)(b) (2009).

58. SANTA CRUZ, CAL., MUNICIPAL CODE § 24-12-1300(2)(b) (2010).

59. L.A., CAL., MUNICIPAL CODE § 45.19.6.3(A)(2)(b) (2010).

60. SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.040(b)(3) (2009).

61. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.030(E)(2) (2009); ARCATA, CAL., MUNICIPAL CODE § 9.42.105(E)(1)(b) (2009); COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(1) (2009); DENVER, COLO., CODE OF ORDINANCES § 24-407(b)(2) (2010); DURANGO, COLO., CODE OF ORDINANCES § 13-115(b) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040(B)(12)(b) (2009); L.A., CAL., MUNICIPAL CODE § 45.19.6.3(A)(2)(a) (2010); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.56.196(F)(1)(a) (2010); MONUMENT, COLO., CODE OF ORDINANCES §§ 17.36.030(C)(1)(e), (f), (h) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); SAN LUIS OBISPO COUNTY, CAL., CODE OF ORDINANCES § 22.30.225(C)(1) (2011); SAN MATEO COUNTY, CAL., CODE § 5.148.050(a)(20) (2009); SANTA CRUZ, CAL. MUNICIPAL CODE § 24.12.1300(2)(c) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.100(C)(1) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.090(C)(1) (2010); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(h)(3) (2009).

62. LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.56.196(F)(1)(a) (2010).

63. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(3) (2009).

schools and medicinal marijuana dispensing facilities.<sup>64</sup> Such facilities in Long Beach, California, must be 1500 feet from the nearest high-school, but only one-thousand feet from other schools, ranging from kindergarten to middle-school.<sup>65</sup>

Local governments have also sought to distance dispensing facilities from other types of locations or uses,<sup>66</sup> such as churches, drug and alcohol rehabilitation facilities, group homes, halfway homes, recreational property, and, in some instances, any publicly owned or maintained properties.<sup>67</sup> Furthermore, some areas require dispensing facilities to be a certain distance from smoke shops, marijuana paraphernalia shops, and other dispensing facilities,<sup>68</sup> such as in Long Beach, California, where dispensing facilities must be one-thousand feet from the nearest similar use.<sup>69</sup>

### 5. *Home Occupations*

One method used for keeping medical marijuana dispensing facilities out of residential districts is to prohibit the dispensing of medical marijuana as a home occupation.<sup>70</sup> Furthermore, some municipalities disallow the cultivation and sale of medical marijuana as an accessory use to another home occupation.<sup>71</sup> In an attempt to ensure that personal residential cultivation conducted by a qualified patient does not convert to a large-scale cultivation and dispensing operation, qualified patients are compelled in some jurisdictions to retain the functional aspects or structures of a residential dwelling—such as bathrooms, bedrooms, a kitchen, and a living room.<sup>72</sup> In Grand Rapids, Michigan, an ordinance requires medicinal marijuana caregivers—those who grow or provide medical marijuana

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64. LONG BEACH, CAL., MUNICIPAL CODE, § 5.87.040(B) (2010).

65. *Id.*

66. *See* COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(1) (2009) (specifying twelve different locations/uses).

67. COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(1)(j) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040(B)(12)(b) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.56.196(F)(1)(a) (2010); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(1)(d), (g), (h), (j) (2009).

68. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.030(E)(1) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040(B)(12)(a) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.56.196(F)(1)(b) (2010).

69. LONG BEACH, CAL., MUNICIPAL CODE, § 5.87.040(C) (2010).

70. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(c) (2009); DURANGO, COLO., CODE OF ORDINANCES § 13-115(a) (2009); LOUISVILLE, COLO., MUNICIPAL CODE § 17.16.235(B)(4) (2009); SANTA CRUZ, CAL., MUNICIPAL CODE § 24-22-539 (2010).

71. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(c) (2009); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.22.539 (2010).

72. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(g) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(12) (2009).



to patients—to register this use with the city as a home occupation.<sup>73</sup> The ordinance also requires that the primary caregiver obtain a business license.<sup>74</sup>

#### 6. Permitted “As of Right”

If one goal in regulating the cultivation and distribution of medical marijuana is to keep it as far away as possible from residential areas, municipalities may opt to allow these activities only in certain districts or areas.<sup>75</sup> There exist many options, besides the requirements and restrictions discussed *supra*, to effectuate the goal of keeping dispensaries away from residential uses, as will be enumerated in the following.

Some municipalities provide that dispensing facilities have no right to be located within a residential zone district.<sup>76</sup> Others typically allow marijuana dispensaries to operate solely in business, commercial, and industrial districts.<sup>77</sup> Some local zoning ordinances allow for medical marijuana dispensing facilities to be located outside of specific zone districts if they are located in medical related buildings—such as medical offices, medical centers, hospital buildings, or hospice facilities.<sup>78</sup> San Mateo County, California, and Alameda County, California, allow medical marijuana dispensing facilities to be located only in the unincorporated areas of the counties.<sup>79</sup> Additionally, perhaps in an attempt to keep dispensaries from operating near residential districts and to keep their loca-

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73. GRAND RAPIDS, MICH., CODE OF ORDINANCES § 5.9.13(R) (2011); *see also* Kyla King, *Grand Rapids Requires Medical Marijuana Caregivers to Register with City*, MLIVE.COM, Mar. 9, 2010, [http://www.mlive.com/news/grand-rapids/index.ssf/2010/03/grand\\_rapids\\_requires\\_medical.html](http://www.mlive.com/news/grand-rapids/index.ssf/2010/03/grand_rapids_requires_medical.html).

74. GRAND RAPIDS, MICH., CODE OF ORDINANCES §§ 7.641, 7.643 (2011); *see also* Kyla King, *Grand Rapids Requires Medical Marijuana Caregivers to Register with City*, GRAND RAPIDS PRESS, Mar. 9, 2010, *available at* [http://www.mlive.com/news/grand-rapids/index.ssf/2010/03/grand\\_rapids\\_requires\\_medical.html](http://www.mlive.com/news/grand-rapids/index.ssf/2010/03/grand_rapids_requires_medical.html).

75. *See* SANTA ROSA, CAL., CITY CODE § 10.40.100(A) (2011) (dispensaries can only be located in commercial or industrial areas).

76. DENVER, COLO., CODE OF ORDINANCES § 24-407(b)(1) (2010), DURANGO, COLO., CODE OF ORDINANCES § 13-115(a) (2009); SANTA ROSA, CAL., CITY CODE § 10.40.100(C)(2) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.090(C)(2) (2010).

77. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.030(E)(3) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES §§ 22.28.110, .160, .210, .260 (2010); BASALT, COLO., MUNICIPAL CODE § 16-190(1) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(1) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.100(A) (2011).

78. BASALT, COLO., MUNICIPAL CODE § 16-190(1) (2010); FRESNO, CAL., MUNICIPAL CODE § 12-306(N)(56)(c) (2009).

79. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.030(A) (2009); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.020 (2009).



tion static, a Monument, Colorado ordinance prohibits dispensing facilities from being located in mobile units.<sup>80</sup>

### 7. *Limiting the Number of Dispensing Facilities*

Of the jurisdictions that allow medical marijuana dispensing facilities, many limit the number of dispensaries by express limits or through the imposition of use permits that have additional obligations to the discussed zoning and residential distancing regulations.<sup>81</sup> The number of dispensaries allowed by ordinance varies greatly.<sup>82</sup> The City of Los Angeles, California, addressing the rampant expansion of dispensaries in the city, allows a maximum of seventy dispensaries.<sup>83</sup> Due to the number of dispensaries already present, if a dispensing facility began its operation prior to the City's initial ordinance in 2007, however, it may be allowed to continue its operation, should the dispensing facility follow the prescribed procedure.<sup>84</sup> Other municipalities have allowed for far less dispensaries to operate within their jurisdiction. For example, Oakland, California, allows eight and Berkeley, California, allows four.<sup>85</sup> Santa Rosa, California, allowed two permits for dispensing facilities to be issued during the initial six month period, and after that period, allowed for additional permits to be considered.<sup>86</sup>

Some jurisdictions also limit the number of dispensaries that can be located within a certain area.<sup>87</sup> The Los Angeles plan, for example, allows for the seventy dispensaries to be distributed proportionally throughout the city based on individualized areas and their population in relation to the entire city's population.<sup>88</sup> To illustrate, Arleta-Pacoima has 2.63% of the population of the City and is allotted two dispensary permits, whereas Bel Air-Beverly Crest has .54% of the population and will be granted zero dispensary permits.<sup>89</sup> Also, Alameda,

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80. MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(5)(f) (2009).

81. BERKELEY, CAL., MUNICIPAL CODE § 12.26.130(A) (2010), SANTA ROSA, CAL., CITY CODE § 10.40.090 (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.080 (2010).

82. *Compare* L.A., CAL., MUNICIPAL CODE § 45.19.6.2(B)(1) (2010) (seventy), *with* BERKELEY, CAL., MUNICIPAL CODE § 12.26.130(A) (2010) (four).

83. L.A., CAL., MUNICIPAL CODE § 45.19.6.2(B)(1) (2010).

84. *Id.* § 45.19.6.2(B)(2).

85. OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); BERKELEY, CAL., MUNICIPAL CODE § 12.26.130(A) (2010).

86. SANTA ROSA, CAL., CITY CODE § 10.40.090(A), (B) (2011).

87. *See* L.A., CAL., MUNICIPAL CODE § 45.19.6.2(B)(1) (2010).

88. *Id.*

89. *Id.* § 45.19.6.2, TABLE 1.

California, allows three dispensaries within its jurisdiction, one in each of three distinct districts.<sup>90</sup>

#### 8. *Licensing and Permits*

A number of municipalities require a special permit or license for the operation of a dispensing facility,<sup>91</sup> requiring facilities to satisfy certain land use regulations and restrictions in the form of operational requirements if they are to be issued a license or permit.<sup>92</sup>

The city of Fort Bragg, California requires dispensing facilities to obtain a medical marijuana dispensing permit from the Chief of Police.<sup>93</sup> The Chief of Police receives the application, must conduct a background check on the applicants and their employees, and execute an investigation into the application.<sup>94</sup> This application is filed under penalty of perjury,<sup>95</sup> and it is the Chief of Police's duty to determine if the application should be granted under the terms of the chapter—taking into account factors such as the security plan and location of the property in relation to other land uses.<sup>96</sup> The ordinance also discusses several reasons for the application to be denied, such as the use does not comply with the Land Use and Development Code, the applicant or their employees have been convicted of a felony, or applicable fees have not been paid.<sup>97</sup> Oakland, California, also requires a permit be obtained before a dispensing facility may begin operation, but its law does not apply a specific standard created precisely for medical marijuana dispensaries, but rather uses the standard for business permits with a few additional criteria considered.<sup>98</sup> In Oakland, California, for example, the permit application is subject to a public hearing and the permit can be denied if the investigating officer feels that the applicant is not a fit and proper person—

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90. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6-108-030(D) (2009).

91. BASALT, COLO., MUNICIPAL CODE § 16-23(c) (2010); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.030 (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 7.55.050(A) (2010); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); S.F., CAL., HEALTH CODE § 3303 (2010); SAN LUIS OBISPO COUNTY, CAL., CODE OF ORDINANCES § 22.30.225(B) (2011); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.040(a) (2009); SANTA CRUZ, CAL., MUNICIPAL CODE §§ 24.10.730(2)(aa)(b)(bb), 24.12.1300 (2010), SANTA ROSA, CAL., CITY CODE § 10.40.090 (2011); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(c) (2009).

92. *See* FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.040 (2009).

93. *Id.* § 9.30.040(A).

94. *Id.* § 9.30.080.

95. *Id.* § 9.30.040(A).

96. *Id.* § 9.30.040(B).

97. *Id.* § 9.30.090.

98. OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2010).

financially or morally—able to run a business.<sup>99</sup> During this process, the clerk also determines whether the location is in the proper zone for the business.<sup>100</sup> In addition to the business permit criteria, the investigating officer is to determine whether the use passes specific dispensing facility requirements—such as distance requirements and additional zoning requirements.<sup>101</sup> Further, the investigating officer can use his or her discretion in giving consideration to what is necessary to protect the order, peace, and welfare of the public, such as the complaint history against the applicant.<sup>102</sup>

Although local governments may have the most at stake concerning medical marijuana dispensaries and land use issues, some states have taken the initiative to address the issuance of licenses. Colorado is one such state, requiring that a Local Licensing Authority issue a Medical Marijuana Center License, an Optional Premises Cultivation License, or a Medical Marijuana Infused Products Manufacturing License before any applicable medical marijuana operation may commence.<sup>103</sup> The state law dictates that such licenses shall not be issued unless the municipal governing body has adopted an ordinance or resolution including detailed standards for the issuance.<sup>104</sup> During the local licensing process, a public hearing on the matter must be held and, if passed, the application is then forwarded to the State Licensing Authority.<sup>105</sup> Before the Local Authority may issue the license, it must do an inspection of the proposed location to determine if the use conforms to the law and the plans submitted in the application.<sup>106</sup> Once the application reaches the State Licensing Authority, the Authority may grant or reject the application.<sup>107</sup> The State Licensing Authority is to promulgate rules and regulations concerning, among other topics, the licensing procedure, including the initial license granting, and the broad operation of the Authority.<sup>108</sup>

a. *Other Licensing Related Restrictions*

Many local governments have enacted restrictions limiting the conduct that dispensing facility can engage in. For example, in some jurisdictions the facility may do no more than dispense medical marijuana, or restrictions are

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99. *Id.*

100. *Id.* § 5.02.130.

101. *Id.* § 5.80.020.

102. *Id.*

103. COLO. REV. STAT. § 12-43.3-301(1) (2011).

104. *Id.* § 12-43.3-301(2)(a).

105. *Id.* §§ 12-43.3-302, 303(5).

106. *Id.* § 12-43.3-303(4).

107. *Id.* § 12-43.3-202(1)(a).

108. *Id.* § 12-43.3-202(1)(b)(I), (2)(a).

placed on what can be sold or produced other than the medical marijuana.<sup>109</sup> Some jurisdictions do not allow for the cultivation of medical marijuana on site.<sup>110</sup> Other jurisdictions do not allow for the sale of marijuana smoking devices or other paraphernalia.<sup>111</sup> Some dispensing facilities may also be prohibited from producing or distributing any food on site.<sup>112</sup> If sale or production is allowed to occur on site, the jurisdiction may then require that it be notified.<sup>113</sup> Some regulations also require that no other goods or services be provided on the dispensing facility's site.<sup>114</sup> In some municipalities, dispensing facilities are not allowed to hold a liquor licenses, nor can alcohol be consumed on the premises.<sup>115</sup> Similarly, many municipalities do not allow for medical marijuana consumption on the premises of the dispensaries, whether through smoking the marijuana or consumption through edibles.<sup>116</sup> The prohibition on the consumption of marijuana, in some instances, also applies to the exterior of the building—with specific distance requirements being imposed.<sup>117</sup> While Los Angeles, California, does allow on site smoking of medical marijuana, it imposes some restrictions—including that the smoking of the medical marijuana takes place in a facility with air purifi-

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109. See LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES §§ 7.55.200, .280 (2010) (prohibiting both the cultivation of marijuana and the sale of alcohol in a marijuana dispensary).

110. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(4) (2009); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(5)(c) (2009); LOS ANGELES, COUNTY, CAL., CODE OF ORDINANCES § 7.55.280 (2010); SAN LUIS OBISPO COUNTY, CAL., CODE OF ORDINANCES § 22.30.225(C)(2)(d) (2011).

111. FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(K) (2009); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(5)(h) (2009).

112. BASALT, COLO., MUNICIPAL CODE § 16-190(3)(h) (2010).

113. S.F., CAL., HEALTH CODE § 3304(c)(8) (2010).

114. FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(I) (2009).

115. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(9) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(H) (2009); L.A., CAL., MUNICIPAL CODE § 45.19.6.3(B)(11) (2010); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 7.55.200 (2010); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(5)(g) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.090 (2009); S.F., CAL., HEALTH CODE § 3308(j) (2010); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26.88.126(i)(8) (2009).

116. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(5) (2009); DENVER, COLO., CODE OF ORDINANCES § 24-408(a) (2010); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(F) (2009); L.A., CAL., MUNICIPAL CODE § 45.19.6.3(B)(13) (2010); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(5)(b) (2009); OAKLAND, CAL., CODE OF ORDINANCES § 5.80.090 (2009); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.050(a)(18) (2009); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(3)(D)(2010); SANTA ROSA, CAL., CITY CODE § 10.40.110(G)(1) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(G) (2010); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(i)(11) (2009).

117. DURANGO, COLO., CODE OF ORDINANCES § 13-116(f) (2009); S.F., CAL., HEALTH CODE § 3308(g) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.110 (G)(1) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(G)(1) (2010).

cation and that water, seating, and restrooms be made available to the qualified patients.<sup>118</sup> While on-site consumption of medical marijuana is typically addressed at the municipal level, Colorado's new law states that it is illegal for medical marijuana to be consumed on the premises of a distribution facility, and that it is also illegal for the facility to allow such consumption.<sup>119</sup>

The security of medical marijuana dispensing facilities is also a common concern.<sup>120</sup> Some municipalities require that the dispensing facility be in a highly visible location that provides good views of the facility and its points of access from the public right of way.<sup>121</sup> A few jurisdictions require that the dispensing facility doors remained locked at all times and that access be granted though the use of strict controls.<sup>122</sup> Another common requirement placed on these facilities is that they must employ a security system that includes lights and alarms.<sup>123</sup> Some localities additionally require the security system to include security cameras with video playback for the preceding days.<sup>124</sup> Specifically, the city of Los Angeles requires that a dispensary provide a security patrol of the surrounding two-block radius.<sup>125</sup>

## 9. Signage

Many local governments restrict the publicity that a dispensing facility is allowed to receive through the limitation on signage.<sup>126</sup> Ordinances often contain

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118. LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 7.55.260(A) (2010).

119. COLO. REV. STAT. § 12-43.3-901(1)(a) (2011).

120. See SANTA ROSA, CAL., CITY CODE § 10-40-110(D)(3), (I)(5)-(8) (2011) (requiring locked entrance and security plans, system, video retention, and alarm); see also *Medical Marijuana Dispensary Burglarized*, GAZETTE.COM, Sept. 20, 2010, <http://www.gazette.com/articles/marijuana-104971-medical-dispensary.html> (discussing one of many burglary attempts against medical marijuana dispensing facilities).

121. SANTA ROSA, CAL., CITY CODE § 10.40.110(I)(1) (2009); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.090 (2010).

122. SANTA ROSA, CAL., CITY CODE § 10.40.110(D)(3) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(D)(3) (2010).

123. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(12) (2009); ARCATA, CAL., MUNICIPAL CODE § 9.42.105(E)(1)(d)(5) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(L) (2009); S.F., CAL., HEALTH CODE § 3304(c)(9) (2010); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(3)(i) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.110(I)(5) (2011); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(i)(2) (2009).

124. DENVER, COLO., CODE OF ORDINANCES § 24-408(g)(1) (2010); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 7.55.300(A) (2010); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(4)(a) (2009); SANTA ROSA, CAL., CITY CODE § 10.40.110(I)(7) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(I)(7) (2010).

125. L.A., CAL., MUNICIPAL CODE § 45.19.6.3(B)(17) (2010).

126. See SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(J) (2010).



restrictions on signs posted on the exterior of the dispensing facility.<sup>127</sup> One such restriction is on the size of exterior signs. These restrictions vary from a maximum area of four square-feet to twenty square-feet.<sup>128</sup> Other regulations prohibit illuminated business identification signs.<sup>129</sup> Some jurisdictions do not allow the signs to block the windows or the door.<sup>130</sup> Raising First Amendment issues, certain municipalities have enacted regulations focusing on content—specifically prohibiting medical marijuana dispensing facilities from advertising the availability of cannabis, on both exterior signs and interior signs when visible from the outside.<sup>131</sup> The content restrictions also ban promotional material that depicts medical marijuana use in any way, such as signs or promotional material discussing marijuana use, cannot be displayed off of the premises or be visible to the public from streets or other public areas.<sup>132</sup> In Colorado, the new state law not only requires signs to satisfy local ordinances, but also disallows advertisements that are misleading, deceptive, false, or constructed to entice to minors.<sup>133</sup>

#### 10. *Miscellaneous Restrictions*

Apart from the major restrictions discussed, there are a plethora of restrictions that apply to medical marijuana dispensaries. Chief among the various zoning ordinances that have been imposed upon dispensing facilities is the duty to ensure the cleanliness of the neighborhood.<sup>134</sup> Some localities require dispensing facilities to frequently administer litter retrieval around the building and the surrounding sidewalks.<sup>135</sup> Others require that graffiti on dispensary facility walls to be removed in a prompt manner.<sup>136</sup>

127. DURANGO, COLO., CODE OF ORDINANCES § 13-116(e) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9-30-120(O) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22-56-196(F)(2) (2010); SAN MATEO, CAL., CODE § 5.148.050(a)(3) (2009); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(J)(4) (2010).

128. FORT BRAGG, CAL., MUNICIPAL CODE § 9.30.120(O) (2009); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(3)(k) (2010).

129. See S.F., CAL., HEALTH CODE § 3308(n) (2010) (ten square feet); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(3)(k) (2010) (stating that an identifying sign cannot be directly illuminated).

130. SANTA ROSA, CAL., CITY CODE § 10.40.110(J)(2) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(J)(2) (2010).

131. SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(i)(4) (2009); DURANGO, COLO., CODE OF ORDINANCES § 13-116(e) (2009).

132. COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(2) (2009).

133. COLO. REV. STAT. § 12-43.3-901(4)(a)-(b) (2011).

134. See SANTA ROSA, CAL., CITY CODE § 10.40.110(O) (2011) (duty to control trash ten feet beyond premises and to clean graffiti).

135. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(14) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22-56-196(F)(6) (2010); S.F., CAL., HEALTH



Some municipalities require that the marijuana inside the facility not be visible from the exterior of the building or the public right of way.<sup>137</sup> Furthermore, it is common to require that produced medical marijuana be kept in a secured, locked location.<sup>138</sup> Additionally, a majority of the jurisdictions impose restrictions on when the dispensing facilities may open, and when they must close.<sup>139</sup> For example, dispensaries are usually not permitted to open before times ranging from 7:00 AM to 10:00 AM and must close within the range of 5:00 PM and 9:00 PM<sup>140</sup> Perhaps guiding municipalities therein, the Colorado statute allows dispensaries to operate between the hours of 8:00 AM and 7:00 PM.<sup>141</sup> San Francisco allows two dispensing facilities to remain open for twenty-four hours a day in order to best serve the needs of the community.<sup>142</sup> Due to the importance of these two unique facilities, the City exercises enhanced control over these sites to ensure the population can use the facilities to their fullest and most beneficial extent. Specifically, these facilities are to be located where it is determined the population needs an open-all-hours facility, must be accessible to late night transportation routes, cannot be within a mile of one another, and cannot be located within certain zone districts.<sup>143</sup>

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CODE § 3308(I) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.110(O)(1) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(O)(1) (2010).

136. LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 7.55.240 (2010); SANTA ROSA, CAL., CITY CODE § 10.40.110(O)(2) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(O)(2) (2010).

137. DENVER, COLO., CODE OF ORDINANCES § 24-408(d) (2010); COMMERCE CITY, COLO., LAND DEV. CODE § 21-5249(2) (2009); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.050(a)(8) (2009).

138. DURANGO, COLO., CODE OF ORDINANCES § 13-116(d) (2009); MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(5)(d) (2009); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.050(a)(17) (2009); SANTA ROSA, CAL., CITY CODE § 10.40.110(I)(2) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(I)(2) (2010).

139. ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.120(A)(3) (2009); DURANGO, COLO., CODE OF ORDINANCES § 13-116(b) (2009); LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.56.196(F)(3) (2010); SAN LUIS OBISPO COUNTY, CAL., CODE OF ORDINANCES § 22.30.225(C)(2)(a) (2011); SANTA CRUZ, CAL., MUNICIPAL CODE § 24.12.1300(3)(e) (2010); SANTA ROSA, CAL., CITY CODE § 10.40.110(C) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(C) (2010); SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(j)(3), (k)(2) (2009).

140. DURANGO, COLO., CODE OF ORDINANCES § 13-116(b) (2009) (limiting hours of operation between 8am and 8pm).

141. COLO. REV. STATE. § 12-43.3-901(4)(I) (2011).

142. S.F., CAL., HEALTH CODE § 3308(e) (2010).

143. *Id.*

Restrictions on the use of land for the dispensing of medical marijuana also exist in the size or attributes of the building itself.<sup>144</sup> Some municipalities require that there be a lobby in the facility and that there be a separate area within the facility for the dispensing of the medical marijuana.<sup>145</sup> As to limitations in size, jurisdictions have taken two approaches: to limit the physical size of the medical marijuana dispensing facility or to limit the number of patients that can be facilitated.<sup>146</sup> Sonoma County, California, ties both of these types of dispensing facility limitations together and adds another restriction.<sup>147</sup> It limits the size of the dispensing facility by how many total patients it may facilitate, the square footage of the location, and the maximum number of patients served on a daily basis.<sup>148</sup> In some jurisdictions, the size limitations are not absolute, and if the dispensing facility wishes to increase the size of the facility, they can do so after obtaining prior approval.<sup>149</sup>

### 11. *Agricultural Uses*

The cultivation of agricultural crops sometimes results in certain state agricultural preferences that may have preemptive effects on municipal regulations that seek to limit or prohibit agricultural related uses.<sup>150</sup> It remains to be seen whether medical marijuana will be treated as an agricultural crop for purposes of special protections and for tax exemptions (e.g., whether land being used primarily for the growing of medical marijuana is eligible for inclusion in agricultural districts). In any event, various land use regulations have been placed upon cultivation of medical marijuana for both distribution and personal use.<sup>151</sup> Medical marijuana is cultivated by care givers, qualified patients for personal use, and by

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144. See SANTA ROSA, CAL., CITY CODE § 10.40.110(I)(1) (2011) (requiring lobby area and separate dispensing area); SEBASTOPOL, CAL., ZONING ORDINANCE §§ 17.140.100(D), (I) (2010) (restricting size to one-thousand feet and requiring lobby area).

145. SANTA ROSA, CAL., CITY CODE § 10.40.110(I) (2009).

146. *Id.*; SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(D)(1) (2010).

147. SONOMA COUNTY, CAL., CODE OF ORDINANCES § 26-88-126(j) (2009).

148. *Id.* Size requirements allow the County to apply additional regulations due to patient higher traffic to the facility. See *id.*

149. SANTA ROSA, CAL., CODE OF ORDINANCES § 10.40.100(D)(2) (2011); SEBASTOPOL, CAL., ZONING ORDINANCE § 17.140.100(D)(2) (2010).

150. SALKIN, *supra* note 32, at § 33:4 (citations omitted).

151. See ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1) (2009) (restricting cultivation area to fifty square-feet); L.A., CAL., MUNICIPAL CODE § 45.19.6.3(B)(3) (2010) (placing specific limitations on on-site marijuana cultivation).

dispensing facilities for their members—possibly giving rise to implications concerning numerous requirements, depending on the jurisdiction.<sup>152</sup>

a. *Zoning Districts*

Similar to dispensing facilities, the use of zoning district restrictions is a common tool implemented in limiting the location of medical marijuana growing operations.<sup>153</sup> In some jurisdictions, medical marijuana cultivation—when not for personal use—is considered an agricultural, resource, or industrial use and is allowed in those types of zone districts.<sup>154</sup> Aspen, Colorado, however, has found that because the cultivation of medical marijuana is an agricultural use, it is not permitted in service/commercial/industrial zoning district and should be permitted only in agricultural use districts.<sup>155</sup>

b. *Limitations on size of cultivation*

Some municipalities impose a limit on how much medical marijuana can be cultivated on site—ranging from the number of plants to the amount of space occupied by the plants.<sup>156</sup> For example, Mendocino County, California, permits twenty-five plants to be planted—whether indoors or outdoors—before the cultivation becomes a nuisance and is no longer permitted.<sup>157</sup> The marijuana plants must also have a zip tie—issued by the sheriff's office for a fee—attached to each individual plant for identification purposes.<sup>158</sup> This restriction applies regardless of the status of the grower—whether they are a qualified patient or a collective.<sup>159</sup>

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152. Compare MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.050 (2010) (no distinction), with ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D) (2009) (cultivation permitted at private residence of qualified patient), and FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.120(G) (2009) (cultivation prohibited at dispensaries).

153. See BASALT, COLO., MUNICIPAL CODE § 16-23(c)(2) (2010) (subjecting medical marijuana farms to special permit review).

154. ARCATA, CAL., MUNICIPAL CODE § 9.26.030 (2009); BASALT, COLO., MUNICIPAL CODE § 16-23(c) (2009).

155. Aspen, Colo., Resolution No. 6, (Jan. 11, 2010), available at <http://www.aspenpitkin.com/Portals/0/docs/cc.res.006-10.pdf>; see also Meeting Minutes of Aspen City Council (Jan. 11, 2010), available at <http://www.aspenpitkin.com/Portals/0/docs/City/clerk/council/cc.min.01110.pdf>.

156. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D) (2009); MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.050 (2010);

157. MENDOCINO COUNTY, CAL., CODE OF ORDINANCES §§ 9.31.040-.050 (2010).

158. *Id.* § 9.31.060.

159. *Id.* § 9.31.050.

In Arcata, California, cultivation of medical marijuana for personal use cannot exceed fifty square-feet and ten feet in height.<sup>160</sup> An additional fifty square-feet of cultivation is permitted where the Zoning Administrator determines it is warranted.<sup>161</sup> Additionally, the patient must install a one-hour green board firewall assembly and must show the cultivation area is a part of detached single family residence or is an accessory building that is enclosed, secured, and locked.<sup>162</sup> In dealing with the cultivation of medical marijuana by a cooperative or a collective, Arcata, California permits substantially more cultivation than what is permitted for personal use.<sup>163</sup> If the use permit allows, limited on-site-cultivation of medical marijuana may reach up to twenty-five percent of the floor space—so long as the cultivation does not exceed 1500 square-feet and ten feet in height.<sup>164</sup> Arcata does not limit the amount of offsite-cultivation, however, and only requires that the cultivation comply with local zoning ordinances.<sup>165</sup> Also addressing this concern, San Francisco, California allows for ninety-nine plants in up to one-hundred square-feet of canopy space to be cultivated.<sup>166</sup>

Fort Bragg, California, also permits cultivation of medical marijuana for personal use or by a qualified caregiver.<sup>167</sup> The city authorizes cultivation that is not to exceed fifty square-feet and 250 cubic-feet.<sup>168</sup> Fort Bragg allows up to one-hundred square-feet and five-hundred cubic-feet, provided that a minor use permit is acquired and, at minimum, a one-hour green board firewall assembly is installed for additional medical marijuana to be cultivated.<sup>169</sup>

c. *Distance Requirements for the Cultivation of Medical Marijuana*

Limitations placed upon the cultivation of medical marijuana imposed by municipalities also concern the distance that the cultivation site can be from certain sensitive locations.<sup>170</sup> These regulations are similar to the distance requirements that localities have imposed on medical marijuana dispensaries, collectives, and cooperatives. It is important to note that if cultivation is authorized to take place on the dispensing facility site, the distance requirements placed upon

160. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1) (2009).

161. *Id.* § 9.42.105(D)(2).

162. *Id.* § 9.42.105(D)(2)(c)-(d).

163. *Compare id.* § 9.42.105(D), with *id.* § 9.42.105(E)(1)(c)(1).

164. *Id.* § 9.42.105(E)(1)(c)(1).

165. *Id.* § 9.42.105(E)(1)(c)(2).

166. S.F., CAL., HEALTH CODE § 3308(f) (2010).

167. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020 (2009).

168. *Id.* § 9-32-020(D).

169. *Id.*

170. *E.g.*, MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.090 (2010).

the dispensing location would logically flow to the cultivation aspect of the operation.

Mendocino County and Fort Bragg, California, require medical marijuana cultivation sites to be a minimum distance from sensitive locations.<sup>171</sup> Mendocino measures this distance from the exterior line of the cultivation site to the exterior line of the sensitive property.<sup>172</sup> These sites include youth oriented facilities, schools, school bus stops, parks, and churches.<sup>173</sup> In Fort Bragg, a facility merely cannot be adjacent to the sensitive location,<sup>174</sup> while in Mendocino County, the distance must be one-thousand feet.<sup>175</sup>

#### d. *Use Restrictions on Cultivation*

Municipalities that permit the cultivation of medical marijuana—whether for personal use or for the use of a dispensing facility—may require that certain restrictions be applied.<sup>176</sup> In fact, Colorado specifically allows municipalities to entirely prohibit or enact reasonable regulations on cultivation.<sup>177</sup>

When dealing with the cultivation of medical marijuana, one common concern entertained by municipalities is the sensory presence of the drug—whether through scent or vision.<sup>178</sup> If the medical marijuana is authorized to be grown outside, many jurisdictions require it to be fenced in or out of the view of the public.<sup>179</sup> Some jurisdictions do not even allow cultivation to take place outdoors, considering it a nuisance.<sup>180</sup> Due to the issues that nearby residents or business may observe, some jurisdictions have restricted the use to that which would not constitute a nuisance—embodied in excess odor, heat, glare, noxious

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171. MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.090 (2010); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(4) (2009).

172. MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.090(B) (2010).

173. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(4) (2009); MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.090(A) (2010).

174. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(4) (2009).

175. MENDOCINO COUNTY, CAL., MUNICIPAL CODE § 9.31.090(A) (2010).

176. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020 (2009).

177. COLO. REV. STAT. § 12-43.3-310(1) (2011).

178. ARCATA, CAL., MUNICIPAL CODE § 9-42-105(F)(1)(c) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(15) (2009); MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.020(G) (2010).

179. L.A., CAL., MUNICIPAL CODE § 45.19.6.3(B)(3) (2010); MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.100 (2010).

180. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(2)(d), (F)(1)(b) (2009); BASALT, COLO., MUNICIPAL CODE § 16-190(3)(f) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(A) (2009); S.F., CAL., HEALTH CODE § 3308(h) (2010).



gases, traffic, crime, and other impacts.<sup>181</sup> Nuisance from the cultivation of medical marijuana has been broadly defined in one jurisdiction to encompass disturbing odors, repeat responses—more than three a year—by law enforcement personnel to the site, excessive noise, or any other disruptive impact created by the cultivation.<sup>182</sup>

Pertaining to personal use medical marijuana cultivation, some jurisdictions place additional restrictions on the manner in which marijuana is cultivated. Certain municipalities require that the lighting used may not exceed 1200 watts, prohibit the use of certain gases, and require that cultivation does not create humidity or mold problems.<sup>183</sup> Some jurisdictions also require that the residential dwelling stay and be used as such—not expanding to a commercial or agricultural use, by containing bathrooms, bedrooms, and a kitchen.<sup>184</sup> Some jurisdictions apply extra requirements to those who do not own the property they intend to cultivate—specifically requiring the user have permission from the owner.<sup>185</sup> Lastly, in some instances, requirements exist for firewall assemblies, venting, and the satisfaction of building and fire codes.<sup>186</sup>

### III. CONCLUSION

With a growing number of states enacting statutes authorizing the use of medical marijuana, land use and community development challenges are certain to increase. Municipalities must be vigilant in the updating of local zoning and land use regulations to ensure that this use meets the public health, safety, and welfare concerns of host communities. In addition, state legislatures should be more mindful of the impacts of medical marijuana statutes on host communities and ensure that the local government representatives have input into the development of various relevant state regulatory regimes.

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181. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(i) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(15) (2009).

182. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(E) (2009).

183. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(a)-(b) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(7), (8), (13) (2009).

184. *See supra* Part II(B)(6).

185. FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(C)(14)(2009); MENDOCINO COUNTY, CAL., CODE OF ORDINANCES § 9.31.080 (2010).

186. ARCATA, CAL., MUNICIPAL CODE § 9.42.105(D)(1)(h), (2)(c) (2009); FORT BRAGG, CAL., MUNICIPAL CODE § 9.32.020(D)(d) (2009).



